

IN THE SUPREME COURT OF THE UNITED STATES 1975

MICHAEL ROGAN JR. CLERK

NO. 75-595

C. DELORES TUCKER, Secretary of the  
Commonwealth of Pennsylvania and  
WILLIAM SYKES,

Appellants

v.

BERNARD SALERA and the UNITED STATES  
LABOR PARTY and THOMAS E. WELSH, Individually and on Behalf of a Class of  
Registered Voters of Pennsylvania and  
CONSUMER PARTY and MAX WEINER, Individually and on Behalf of a Class of  
Registered Voters of Pennsylvania,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE EASTERN DISTRICT  
OF PENNSYLVANIA

MOTION OF APPELLEES MAX WEINER  
AND CONSUMER PARTY TO AFFIRM

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OPINION BELOW

The opinion below is reported  
at 399 F. Supp. 1258 (Appendix ("App.")  
to the Jurisdictional Statement 9) and

2.

the Amended Order dated August 6, 1975,  
is reported at 399 F. Supp. 1269 (App. 29).

JURISDICTION

This is a direct appeal pursuant  
to 28 U.S.C. § 1253 from an order entered  
August 6, 1975, by a three-judge district  
court convened pursuant to 28 U.S.C.  
§ 2284. The notice of appeal was filed  
August 15, 1975.

QUESTIONS PRESENTED

1. Where the Constitutionality  
of state restrictions on ballot position  
for independent political candidates is  
challenged by plaintiffs certified to  
represent separate classes of independent  
voters, independent candidates, and  
political bodies desiring to support  
such candidates, does the validity of  
such state restrictions depend upon  
whether they are necessary to further  
compelling state interests?

3.

2. Where no substantial state interest, much less a compelling state interest, can be discerned to sustain the restrictive time limitation the enforcement of which was enjoined by the district court, should the decision below be affirmed?

#### STATUTE INVOLVED

The court below enjoined enforcement of the time limitation on filing of nomination papers to obtain ballot position for independent candidacies, Pennsylvania Election Code of 1937, as amended August 13, 1963, P.L. 707, § 12, 25 Purdon's Pa. Stat. Ann. § 2913(b) and (c), as follows:

"(b) No nomination paper shall be circulated prior to the tenth Wednesday prior to the primary, and no signature shall be counted unless it bears a date affixed not earlier than the tenth Wednesday prior to the primary nor later than the seventh Wednesday prior to the primary."

4.

"(c) All nomination papers must be filed on or before the seventh Wednesday prior to the primary."

#### STATEMENT

This appeal is from the most recent of four decisions concerning the Constitutionality of Pennsylvania's restrictions on the time period within which to circulate and file nomination papers to obtain ballot positions for independent candidacies. Although an independent political group (referred to in the Pennsylvania Election Code as a "political body," in contrast to an established "political party," 25 Purdon's Pa. Stat. Ann. § 2831) is not allowed to participate in the primary election held on the third Tuesday of May in ordinary years and held on the fourth Tuesday of April in Presidential election years, 25 Purdon's Pa. Stat. Ann. §§ 2753 and 2754, the time



5.

limitation for the filing of such nomination papers is the seventh Wednesday prior to the primary, as set forth in Section 2913(c), quoted above.

The statutory limitation restricts the circulation and filing of nomination papers in nonpresidential years to a three-week period which ends 218 days before the November general election, and which ends 244 days before the November election in presidential years.

In People's Party v. Tucker, 347 F. Supp. 1 (M.D. Pa. 1972), a three-judge court held, one judge dissenting, that the three-week period was "so short and so remote from the election as to be unreasonable. We have been unable to ascertain any valid purpose to be served by it." 347 F. Supp. at 4. The court's order enjoined enforcement of the time limitations and required the acceptance of nomination papers circulated and

6.

filed on or before August 14, 1972. In Consumer Party v. Tucker, 364 F. Supp. 594 (E.D. Pa. 1973), a single judge, applying the rule of res judicata, held that the decision in People's Party applied also in the Eastern District of Pennsylvania and that the August 14 date should continue in effect "until such time as the General Assembly of Pennsylvania may enact a Constitutional time limitation in lieu thereof." The case from which the instant appeal arises was commenced by the parties to the Consumer Party decision following proceedings in the Commonwealth Court of Pennsylvania in which papers filed within the August 14 limitation stated in the orders entered in the People's Party and Consumer Party decisions were rejected by the state court as untimely. After several hearings and on the basis of evidence which was not contradicted

and received largely by stipulation, the three-judge court held that the three-week limitation was Constitutional, but that there was no "compelling state interest" which would "warrant the burden on independent candidacies which results from the early filing date." 399 F. Supp. at 1267-68, App. 22-25. The court accordingly entered an order by which the Secretary of the Commonwealth and subordinate election officers were enjoined from enforcing the time limitation as to the classes of independent voters, potential independent candidates, and political bodies supporting such candidacies which plaintiffs had been certified to represent, and requiring the acceptance of nomination papers filed on or before August 21 in each succeeding year, until the Pennsylvania legislature shall act to establish a new limitation.

# ARGUMENT

The decision below is manifestly correct and should be affirmed. The matters presented by the Commonwealth as occasions for the appeal are so unsubstantial as not to require further argument.

The Constitutional validity of restrictions placed on the procedures by which independent political candidates obtain ballot position "depends upon whether they are necessary to further compelling state interest . . . ." American Party of Texas v. White, 415 U.S. 767, 780, citing Storer v. Brown, 415 U.S. 724, 729-33.

The instant appellees were certified by the court below as class representatives of three separate classes of independent voters, potential independent candidates, and political

bodies desiring to support such candidates, 399 F. Supp. at 1262 n.4, App. 12 n.4, and had previously been certified as class representatives in the People's Party and Consumer Party decisions. The court below found on the basis of the evidence, and without any disagreement by the Commonwealth:

"Plaintiffs have shown that the remoteness of the signature gathering period from the general election substantially impairs the ability of plaintiffs' candidates to qualify as eligible independent candidates, and so threatens to keep off the ballot candidates for whom eligible voters wish to cast their vote . . . ."  
399 F. Supp. at 1266, App. 22.

On this record, the court below was correct to determine the Constitutional validity of the Pennsylvania restrictions by applying to those restrictions the standard reaffirmed in American Party and Storer.

Both in the proceedings below and in this Court, the Commonwealth has failed to point to any state interest, much less a "compelling state interest," which would support the 218 day restriction (244 days in a Presidential year such as 1976). Neither the Jurisdictional Statement nor the Commonwealth's subsequent filings with this Court describe any such state interest.

Notwithstanding the inability of the Commonwealth to define a state interest or suggest to the court below any reason for the 218 day restriction, the cautious opinion of the three-judge court considered carefully--and sua sponte--"three state interests arguably served by the time limit", and found each such interest to be neither compelling nor substantial. 399 F. Supp. at 267-68, App. 22-25. As to an interest based on administrative con-



venience, the court below found that the "evidence reveals" that ballots were not prepared "until the latter part of September" and that a candidate's name "can be added to or removed from the ballots in late September without more than minor inconvenience." 399 F. Supp. at 1267, App. 22-23. On a second possible "compelling interest," the court below recognized that Pennsylvania might validly desire to exclude defeated primary candidates from the independent candidacy ballot process, as was sustained in Storer, but that there were "less restrictive" means of effecting that exclusion than "scheduling the signature gathering period so far in advance of the primary," and accordingly that "the justification for this scheduling cannot be found in the state's compelling interest in divorcing the party primary candidate selection

process from the independent one." 399 F. Supp. at 1267, App. 23-24. As a third possible "compelling interest," the court below considered whether there was any benefit to voters in the primary election from their having knowledge, prior to the primary, of the independent candidates who had filed for a place on the November election ballot. The court below assumed, for purposes of evaluating this interest, that primary election voters would have knowledge of the nomination papers on file at the Secretary of the Commonwealth's office, notwithstanding that no reference to those candidates would appear on the primary election ballot. Even on that assumption, which was not sustained by any evidence in the record and which seems to assume that every citizen has actual knowledge of every paper on file at a Government office if such paper is a public



record, the court below found that the restrictive early filing date would create "what is at best a marginal increase in knowledgeable voting," and that such a "state interest is insufficiently compelling to warrant the burden on independent candidacies which results from the early filing date." 399 F. Supp. at 1268, App. 24-25.

Neither in the court below nor in this Court does the Commonwealth urge that any of the three "state interests" considered by the court below is either "compelling" or "substantial." Nor does the Commonwealth point to any other interest which would justify the restriction.

The issues which the Commonwealth does raise in this Court are so unsubstantial as not to need further argument.

The Commonwealth's principal occasion for this appeal appears to be

based upon a claimed administrative inconvenience created by the fact that the United States District Court for the Eastern District of Pennsylvania acted within its territorial jurisdiction in preparing the Amended Order, 399 F. Supp. at 1269, App. 29-31, so that the injunction is in force only as to classes of independent voters, independent candidates, and political bodies supporting such candidates, located within the Eastern District of Pennsylvania. This administrative inconvenience appears to be largely the creation of the Commonwealth itself, which has chosen to disregard the effect of the Order upon the Secretary of the Commonwealth in her state-wide capacity and, in any event, upon affirmance (or reversal) of the order below, such administrative inconvenience will be obviated because the decision of this

15.

Court will necessarily determine the Constitutionality of the time limitation throughout Pennsylvania.

The Commonwealth's other argument is that another three-judge court, in Williams v. Tucker, 382 F. Supp. 381 (M.D. Pa. 1974), sustained the Constitutionality of the three-week signature gathering period under Section 2913(b). The Williams decision is hardly in conflict with the instant decision, because the court below in the instant case reached the same conclusion:

"We decline to invalidate the 21 day signature gathering period for nomination papers . . . ."  
399 F. Supp. at 1266, App. 21.

As to the time limitation for filing nomination papers, Section 2913(c), the Williams court neither considered nor adjudicated the validity of that provision. In any event, the Williams

decision was carefully considered by the court below in the instant case and carefully distinguished. 399 F. Supp. at 1268, App. "A" at 25-26. Williams involved a "defeated party candidate," an incumbent Congressman who sought the re-nomination of the Republican Party and, after defeat in the primary, sought a second opportunity by filing as an independent candidate. As the court below stated, 399 F. Supp. at 1268, App. 26:

"The present case, however, involves interests which were not present nor considered in Williams. Plaintiffs herein are precisely those persons whose rights are unnecessarily infringed by the provisions which legitimately barred persons such as Congressman Williams from the ballot . . . ."

The Commonwealth's third contention, that the court below "usurped a legislative function and abused its judicial powers" (Jurisdictional Statement 7), does not require argument subsequent to Marbury v. Madison, 1 Cranch 137.

## CONCLUSION

For the reasons stated, the  
judgment below should be affirmed.

Respectfully submitted,

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